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No. 82-385

IN THE

Supreme Court of the United States

October Term, 1982

HELEN B. O'BANNON, et al.,
Petitioners

v.

JACK SHADIS, et al.,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the trial court abuse its discretion by awarding attorney's fees to legal service program lawyers in a civil rights case and declining to enforce a provision in that program's funding contract which prohibited it from exercising its federal statutory right to seek a judicial award of fees in civil rights cases brought against the State?

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COUNTERSTATEMENT OF THE CASE

This case stems from efforts of the Department of Public Welfare of Pennsylvania ("DPW") to impose contractual provisions which would prevent Community Legal Services, Inc. ("CLS") from obtaining fees where CLS attorneys have successfully represented clients in civil rights litigation against the Commonwealth.

Beginning with fiscal year 1978-79, DPW has insisted, over the continuous objections of CLS and its conduit funding organization, Pennsylvania Legal Services Center ("PLSC"), that funding contracts with PLSC contain a provision restricting the rights to request or receive attorneys' fees in cases against the Commonwealth and its employees. DPW has compelled PLSC to include similar provisions in its funding agreements with local legal service programs, including CLS. (Pet. App. at 6a).

The proposed 1979-80 funding contract contained such a fee restraint. CLS returned that contract to PLSC together with a letter objecting to the fee restraint and making CLS' obligations under the anti-fee provision conditional on the court holding CLS to be bound by a similar provision then being challenged in *Bolden v. Pennsylvania State Police*, 491 F. Supp. 958 (E. D. Pa. 1980) (Green, J.) (Pet. App. at 7a & n.5). The fee restraint in the 1979-80 contract never became effective because the district court in *Bolden* held that the similar fee restraint was not effective and the Commonwealth did not appeal.

In 1980 DPW again insisted that no funding would be forthcoming for any legal services program which did not sign a contract containing the fee restraints. (Pet.

App. at 8a).[1] CLS officers, faced with obligations of professional responsibility to poor clients and confronted with the imminent threat of CLS' fiscal death, signed the 1980-81 proposed contract but reserved its right to challenge the fee restraint.[2] (Pet. App. at 8a).

CLS did challenge the fee restraint and was upheld by the district court and affirmed by the court of appeals. The Commonwealth now seeks review by this Court.

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1. Contemporaneously with this struggle over fees, the Commonwealth also subjected CLS to serious cutbacks in appropriations. (Pet. App. at 8a, n. 6).

2. More recently, the General Assembly of Pennsylvania inserted a provision in the General Appropriations Act for 1981-82, Act No. 81-5A, which, if given effect, will reduce the Commonwealth's appropriations to legal services dollar-for-dollar with any award of attorney's fees against any Commonwealth agency or official and in favor of a legal service provider. CLS believes this statute is invalid on several grounds including an impermissible conflict with federal law and policy. CLS has filed a petition to intervene in *Commonwealth v. Pennsylvania Legal Services Center*, No. 82-0148 (M. D. Pa.), and intends to challenge the appropriations bill in that case, if intervention is permitted.

ARGUMENT

There are at least four persuasive reasons why the lower courts' invalidation of a contract clause inserted in CLS' funding contracts by the Commonwealth to restrict fee awards to CLS lawyers does not merit further review.

First, the conflict found by the courts below between the contractual fee restraints and the policies underlying the Fees Awards Act results from a simple application of accepted principles and is not contrary to any holding of this Court or of any federal courts of appeals. *Second*, the holding below is so narrow that it is unlikely to extend beyond the parties involved. *Third*, a grant of certiorari in this case would be pointless because the Commonwealth now seeks its original objective through statute rather than by contract and another case to test that issue is now pending, *Commonwealth v. Pennsylvania Legal Services Center*, No. 82-0148 (M. D. Pa. 1981). *Fourth*, even if Petitioners are successful on the issue presented to this Court there are additional independent factual and legal grounds for the decision below.

Only a brief amplification of these points is warranted.

I. The Standard of Unenforceability Adopted by the Courts Below Is Correct and Is Not in Conflict With Any Decision of This Court or Any Federal Court of Appeals.

The courts below held that the fee restraints in the Commonwealth's funding contracts counteracted the frequently enunciated public policies underlying the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C.

§ 1988 (the "Fees Awards Act"). This result was reached by balancing the factors favoring enforcement of the contracts and the compelling public policies against it. This is the approach found in Section 178 of *Restatement (Second) of Contracts* (1981), a sound and scholarly approach which has been applied by the courts of appeals of other circuits. *See Jackson Purchase Rural Electric Cooperative Ass'n. v. Local 816, IBEW*, 646 F. 2d 264, 267 (6th Cir. 1981); *California Pacific Bank v. Small Business Administration*, 557 F. 2d 218, 224 (9th Cir. 1977). Indeed, no federal court has rejected, or even questioned, the Restatement's standard.

Petitioners, however, argue for a standard which limits the doctrine of unenforceability to situations in which "the contractual terms were directly and expressly prohibited by statute" (Pet. at 9).[3] But such a narrow and novel standard is contrary to the express provisions of the Restatement,[4] and fails to appreciate that public policy may derive from legislative sources even where the statute does not expressly prohibit the provision in question. As noted in the Restatement's Commentary:

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3. In effect, Petitioners suggest a standard that would limit the doctrine of unenforceability to contracts which are "illegal" in the literal sense. *Jackson Purchase, supra,* and *California Pacific Bank, supra,* fail to support the standard asserted by Petitioners since neither decision required an express statutory prohibition as a condition to a finding of unenforceability.

4. Section 178 of the Restatement (Second) of Contracts provides:

> (1) A promise or other term of an agreement is unenforceable on ground of public policy if legislation provides that it is unenforceable *or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.* (Emphasis added).

> The legislation is significant, not as controlling the disposition of the case, but as enlightening the court concerning some specific policy to which it is relevant. A court will examine the particular statute in the light of the whole legislative scheme . . . It will look to the purpose and history of the statute. Comment b to Section 179.

This is precisely what the courts below did.

Unable to mount a serious challenge to the Restatement's standard, Petitioners seek comfort in *D. H. Overmyer Co. v. Frick Co.*, 405 U. S. 174 (1972). There, the Court held that a "cognovit" clause could be enforced against a corporate debtor without violating the Due Process Clause of the Fifth Amendment. From this, Petitioners contend that one who can waive constitutional rights must necessarily be permitted to waive any lesser rights. But that reasoning hardly compels a federal court to enforce a contractual provision designed to eliminate judicial authority to administer fee awards in civil rights cases.

Moreover, Petitioner's reliance upon "waiver" simplistically ignores the plain fact that the Fees Award Act embodies public policies having impact far beyond the lawyers who seek an award of fees. Courts have long refused to enforce an attempted relinquishment of statutory rights enacted for the benefit of the public as a whole where the purported waiver has negative impact beyond the contracting parties. *See Fox Midwest Theatres v. Means*, 221 F. 2d 173, 180 (8th Cir. 1955); *Three Rivers Motors Co. v. Ford Motor Co.*, 522 F. 2d 885, 896 n. 27 (3d Cir. 1975). Similarly, courts have often declined to allow one to waive the benefit of a statute

which was enacted for the protection of a class to which he belongs. *See, e.g., Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U. S. 728, 740 (1981). Here, it is not disputed that the Fees Awards Act was enacted for the benefit of all citizens to encourage active litigation of civil rights. *See* Note, *The Civil Rights Attorney's Fees Awards Act of 1976: A View From the Second Circuit*, 29 Buffalo L. Rev. 559 & n. 3 (1980).[5] Such litigation vindicates significant Congressional policies, not only for the individual plaintiff, but also for others similarly situated. *See Newman v. Piggie Park Enterprises, Inc.*, 390 U. S. 400, 401-02 (1968).

Petitioners next argue that the contractual fee restraints did not violate public policy because fee awards under the Fees Awards Act are discretionary. Of course the Fees Awards Act invests discretion in the federal courts. But it does not follow, as Petitioners assume, that State officials can override that discretion by a contractual clause which abrogates the opportunity to seek fees, interferes with the equitable power of the judiciary under the Fees Awards Act, and eliminates a Congressionally created incentive to further enforcement of the civil rights laws.

Petitioners assert a public interest in funding legal service programs with a known budget. As the court of

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5. A prospective waiver on an *en masse* basis, like the fee restraints in this case, would thwart the incentives which Congress deemed so critical. Even waivers on a case-by-case basis, after the litigation has run its course, have been denied effect. *Cf. Committee on Professional and Judicial Ethics of N. Y. City Bar Ass'n.*, Opinion No. 80-94, *summarized at* 50 U. S. L. W. 2204-05 (Sept. 20, 1981) (persistent demands by defense counsel for a waiver of statutory fee awards found to be a serious threat to the effectiveness and purposes of such awards and to be contrary to the obligations of the Code of Professional Responsibility).

appeals stated, this argument confuses public funding of legal services with awards of attorney's fees by judicial determination in specific types of litigation, as authorized by statute. (Pet. App. at 18a).

Obviously, the Commonwealth's funding of legal service programs is not an effective substitute for the Fees Awards Act, which is designed to promote the private enforcement of federal civil rights laws by offering certain economic inducements through the availability of fee awards. *See* H. R. Rep. No. 94-1558, 94th Cong., 2d Sess. 1, 19 (1976); *Rodriguez v. Taylor*, 569 F. 2d 1231, 1245 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).[6] While funding of legal services furthers the representation of the indigent, it does not provide the incentives to undertake the representation in civil rights litigation which Congress hoped to encourage.[7]

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6. Congress clearly viewed the ability to seek fees under the Fees Awards Act as a right of critical significance. *See* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U. S. Code Cong. & Ad. News 5908, 5910 and 5913. The Senate Report put it succinctly:

> [T]he effects of such fee awards are ancillary and incident to securing compliance with these laws, and . . . fee awards are an integral part of the remedies necessary to obtain such compliance . . . If our civil rights laws are not to become mere hollow pronouncements which the average citizen cannot enforce, we must maintain the traditionally effective remedy of fee shifting in this case. *Id.* at 5913.

7. Moreover, the threat of fee awards serves as an inducement to compliance with civil rights laws and early settlement of such litigation. *Dennis v. Chang*, 611 F. 2d 1302, 1307 (9th Cir. 1980); *Rodriguez v. Taylor*, 569 F. 2d at 1245. *See also* Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 Harv. L. Rev. 411, 414, 418-19 (1973). Advance funding provides no such inducement.

It is also indisputable that legal service programs, like private attorneys, are intended recipients of fees under the Fees Awards Act.[8] *Dennis v. Chang*, 611 F. 2d 1302, 1306 (9th Cir. 1980). Because legal services organizations necessarily operate on an increasingly limited budget, they must consciously balance their case load against the realities of limited manpower and economic resources. *Rodriguez v. Taylor*, 569 F. 2d at 1245. *See also Incarcerated Men of Allen County Jail v. Fair*, 507 F. 2d 281, 286 (6th Cir. 1974); Note, *Awards of Attorney's Fees to Legal Aid Offices*, 87 Harv. L. Rev. 411, 414 (1973). Awards of fees to such organizations in civil rights cases encourage representation of clients seeking redress in that area—precisely what Congress intended by enacting the Fees Awards Act.[9]

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8. In *Incarcerated Men of Allen County Jail v. Fair*, 507 F. 2d 281 (6th Cir. 1974), the court awarded attorney's fees to a legal service organization prior to the Fees Awards Act. That case is cited with approval in the legislative history of the Fees Awards Act. H. R. No. 94-1558, 94th Cong., 2d Sess. 18, n. 16 (1976). *Cf. Alyeska Pipeline Co. v. Wilderness Society*, 421 U. S. 240, 262-63, n. 36 (1975) (legislative history of the Legal Services Corporation Act of 1974, 42 U. S. C. § 2996, indicated no intent to restrict the recovery of fees by the Corporation or its recipients).

9. Indeed, an award to a legal services program goes further towards the concept of private enforcement than does an equal award to a private attorney. Such awards have a multiplier effect because any fees recovered support additional legal services for the poor. Legal service organizations are peculiarly important recipients of attorney's fees because of the unique enforcement role that they serve. *See Rodriguez v. Taylor*, 569 F. 2d 1231, 1248 (3d Cir. 1977).

II. Alternative Grounds Exist for the Decision Reached by the Courts Below.

A fair reading of the district court opinion reveals that the court was ready to award fees to CLS regardless of any contract law analysis and was empowered to do so because the equitable authority of federal courts is not constrained by technical doctrines of contract law. *See United States v. Coca-Cola Bottling Company of Los Angeles,* 575 F. 2d 222 (9th Cir. 1978), *cert. denied sub nom., Aqua Media, Ltd. v. United States,* 439 U. S. 959 (1978). Clearly, the Commonwealth cannot contractually avoid the equitable powers of federal courts. *See Dodge v. Tulleys,* 144 U. S. 451, 457 (1892). Hence the issue raised by Petitioners would not resolve this matter in any event since fees could have been awarded here in an exercise of the court's traditional equitable powers, now codified by the Fees Awards Act. *See Hall v. Cole,* 412 U. S. 1, 4-5 (1973); *Mills v. Electric Auto-Lite Co.,* 396 U. S. 375, 392-93 (1970). Moreover, numerous courts have held that private fees agreements do not control awards of fees under the Fees Awards Act. *See, e.g., Krause v. Rhodes,* 640 F. 2d 214, 218-19, n.5 (6th Cir.), *cert. denied sub nom. Sindell, Lowe & Guidubaldi v. Ohio,* — U. S. —, 102 S. Ct. 140 (1981); *Fleet Investment Co. v. Rogers,* 620 F. 2d 792 (10th Cir. 1980); *Sargeant v. Sharp,* 579 F. 2d 645 (1st Cir. 1978).

There are also independent grounds for denying effect to the fee restraint in each of the funding contracts based upon State contract law. The fee restraint in the 1979-80 contract was inoperative because of the non-occurrence of a condition to its enforceability. Although the court of appeals did not rely on this rationale, it found that "CLS'

letter acknowledged that the question of the no fees restriction was *sub judice* and that its obligations under that provision were conditional on the court in *Bolden* holding CLS to be bound by the similar provision under challenge in that case". (Pet. App. at 7a, n. 3). That condition failed when Judge Green held in *Bolden* that the fee restraints were invalid.

With respect to the 1980-81 contract, the court of appeals decision suggests that if still another alternative ground were necessary, it was not reluctant to find that the fee restraint was also voidable as a product of economic duress.[10]

Thus, certiorari would also be inappropriate for the further reason that the decision of the court below is independently supported by the Federal judiciary's equitable powers and State law contract principles.

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10. The court of appeals noted:

"[F]or the sake of factual completeness it is important to stress that DPW had insisted that it would not provide any 1980-81 funding for any social program which had not signed a contract which conformed to DPW demands (including the no fees provision). Appendix at 117a. On June 26, 1980, CLS unexpectedly suffered a $118,000 reduction in its Title XX reimbursements for expenses incurred during April and May of that year. Appendix at 116a. In June 1980, CLS was facing its second successive annual funding cut by the Commonwealth which had already resulted in service reductions and a 20% decrease in attorney staff. Appendix at 115a." (Pet. App. at 8a, n. 6; *see also* Pet. App. at 37a, n. 7).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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